112—94

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.4

No. ~~305.~~ 97

JOHN ELK, PLAINTIFF IN ERROR,

vs.

CHARLES WILKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 24, 1881.

SUPREME COURT OF THE UNITED STATES.

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No. 305.

JOHN ELK, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a Pleas before the Honorable George W. McCrary, Judge of the Circuit Court of the United States for the Eighth Judicial Circuit and District of Nebraska, and the Honorable Elmer S. Dundy, Judge of the District Court of the United States for said District, sittting in said Circuit Court, at the Term of May, A. D. 1881.

JOHN ELK, Plaintiff, *vs.* CHARLES WILKINS, Defendant.

Be it remembered that on the 14th day of April, 1880, a petition was filed in the office of the clerk of said circuit court, which said petition is in words and figures following, to wit:

1 *Petition.*

In the Circuit Court of the United States, District of Nebraska.

JOHN ELK, Plaintiff, *vs.* CHARLES WILKINS, Defendant.

John Elk, plaintiff, complains of Charles Wilkins, defendant, and avers that the matter in dispute herein exceeds the sum of five hundred dollars, to wit, the sum of six thousand dollars, and that the matter in dispute herein arises under the Constitution and laws of the United States; and for cause of action against defendant, avers that he, the plaintiff, is an Indian, and was born within the United States; that more than one year prior to the grievances hereinafter complained of he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States, and avers that, under and by virtue of the Fourteenth Amendment to the Constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States.

That on the sixth day of April, 1880, there was held in the city of Omaha, (a city of the first class, incorporated under the general laws of the State of Nebraska providing for the incorporation of cities of the first class,) a general election for the election of members of the city council and other officers for said city.

That the defendant, Charles Wilkins, held the office of and acted as registrar in the fifth ward of said city, and that as said registrar it was the duty of such defendant to register the names of all persons entitled to exercise the elective franchise in said ward
2 of said city at said general election.

That this plaintiff was a citizen of and had been a *bona fide* resident of the State of Nebraska for more than six months prior to said sixth day of April, 1880, and had been a *bona fide* resident of Douglas county, wherein the city of Omaha is situate, for more than 40 days, and in the fifth ward of said city more than ten days prior to said 6th day of April, and was such citizen and resident at the time of said election, and at the time of his attempted registration, as hereinafter set forth, and was in every way qualified, under the laws of the State of Nebraska and of the city of Omaha, to be

registered as a voter and to cast a vote at said election, and complied with the laws of the city and State in that behalf.

That on or about the 5th day of April, 1880, and prior to said election, this plaintiff presented himself to said Charles Wilkins, as such registrar, at his office, for the purpose of having his name registered as a qualified voter, as provided by law, and complied with all the provisions of the statutes in that regard, and claimed that, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, he was a citizen of the United States, and was entitled to exercise the elective franchise regardless of his race and color, and that said Wilkins, designedly, corruptly, willfully, and maliciously, did then and there refuse to register this plaintiff, for the sole reason that the plaintiff was an Indian, and therefore not a citizen of the United States, and not, therefore, entitled to vote, and on account of his race and color, and with the willful, malicious, corrupt, and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights and all other Indians of their rights under said Fourteenth and Fifteenth Amendments to the Constitution of the United States on account of his and their race and color.

That on the 6th day of April this plaintiff presented him-
3 self at the place of voting in said ward, and presented a ballot and requested the right to vote, where said Wilkins, who was then acting as one of the judges of said election in said ward, in further carrying out his willful and malicious designs aforesaid, declared to plaintiff and to the other election officers that plaintiff was an Indian and not a citizen and not entitled to vote, and said judges and clerks of election refused to receive the vote of plaintiff, for that he was not registered as required by law.

Plaintiff avers the fact to be that by reason of said willful, unlawful, corrupt, and malicious refusal of said defendant to register this plaintiff, as provided by law, he was deprived of his right to vote at said election, to his damage in the sum of $6,000.

Wherefore plaintiff prays judgment against defendant for $6,000, his damages, with costs of suit.

A. J. POPPLETON AND
JNO. L. WEBSTER,
Att'ys for Plaintiff.

STATE OF NEBRASKA, }
Douglas County, } ss:

John Elk, being first duly sworn, deposes and says that he has heard read the contents of the foregoing petition, and that the facts therein stated are true, as he verily believes.

his
JOHN × ELK.
mark.

Sworn to before me and subscribed in my presence, this 14th day of April, 1880.

[SEAL.] EDWARD W. SIMERAL,
Notary Public in and for Douglas County, State of Nebraska.

4 Said petition is endorsed as follows:

No. 330, E. U. S. circuit court, district of Nebraska. John Elk, plaintiff, *vs.* Charles Wilkins, defendant. Petition. Filed April 14, 1880. Watson B. Smith, clerk. A. J. Poppleton. Jno. L. Webster.

Thereupon afterwards, to wit, on the 14th day of April, 1880, a summons was duly issued in said case, and on the 15th day of April, 1880, returned and filed, which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska. }

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendant, Charles Wilkins, that he has been sued by John Elk in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha, Nebraska, that unless he answer by the 17th day of May, A. D. 1880, the petition of the said plaintiff, this day filed against him in the clerk's office of said court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 26th day of April, A. D. 1880.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of April, A. D. 1880, and in the 104th year of the Independence of the United States of America.

[SEAL.] Attest: WATSON B. SMITH, *Clerk.*

Attached to said summons is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

5 I hereby certify and return that on the 14th day of April, 1880, I received this summons, and on the 15th day of April, 1880, I served the same upon the within named Charles Wilkins, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof with all the endorsements thereon.

WILLIAM DAILY,
United States Marshal for the District of Nebraska.

By E. L. BIERBOWER,
Deputy United States Marshal.

Marshal's costs, $2.06.

Said summons is endorsed as follows:

No. 330, Doc. E. United States circuit court, district of Nebraska. John Elk *vs.* Charles Wilkins. Summons. Amount claimed of the defendant by the plaintiff is $6,000, and costs of

suit. Returned and filed, this 15th day of April, 1880. Watson B. Smith, clerk. Poppleton and Webster, att'ys for pl'ff.

Thereupon afterwards, to wit, on the 8th day of November, 1880, a demurrer was filed in said case, which said demurrer is in words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN ELK, Plaintiff *vs.* CHARLES WILKINS, Defendant.

Now comes the defendant, by his attorneys, G. M. Lambertson and E. W. Simeral, and demurs to the petition of the said plaintiff, and for cause of demurrer alleges:

I. That the petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant.

II. That the court has no jurisdiction of the person of
6 the defendant.

III. That the court has no jurisdiction of the subject of the action.

G. M. LAMBERTSON,
E. W. SIMERAL,
Att'ys for Def't.

said demurrer is endorsed as follows:

E. 330. In U. S. circuit court, district of Nebraska. John Elk *vs.* Chas. Wilkins. Demurrer. Filed Nov. 8, 1880. Watson B. Smith, clerk. Lambertson and Simeral, att'ys for def't.

Thereupon afterwards, at the May term of said court, on the 7th day of May 1881, the following proceedings were had in said case, as appears of record on folio 69, Journal G, of said court:

Demurrer to Petition.

JOHN ELK *vs.* CHARLES WILKINS.

This cause coming on for hearing on the demurrer of the defendant to the petition of the plaintiff herein, and after hearing the argument of counsel, and being fully advised in the premises, it is ordered and adjudged by the court that said demurrer be sustained; and to which order and judgment of the court the plaintiff excepts.

The plaintiff electing to stand by his petition, it is further ordered and adjudged that this cause be, and the same hereby is, dismissed, and that the defendant have and recover of the plaintiff his costs herein expended, taxed at $21.61, to which judgment the plaintiff excepts.

7 Thereupon afterwards, to wit, on the 13th day of May, 1881, a writ of error was allowed, and on the 13th day of

June, 1881, a citation issued, of which the following are the originals:

8 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between John Elk, plaintiff, and Charles Wilkins, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said District, this thirteenth day of May, 1881.

WATSON B. SMITH, *Clerk.*

Circuit judge absent from the district.
Allowed by—
ELMER S. DUNDY, *Judge.*

Endorsed: No. 330, E. United States circuit court, district of Nebraska. John Elk *vs.* Charles Wilkins. Writ of error. Filed May 13, 1881. Watson B. Smith, clerk.

9 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Charles Wilkins, of Omaha, Douglas county, Nebraska, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein John Elk is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 13th day of June, 1881.

Circuit judge absent from the district.

ELMER S. DUNDY, *Judge.*

We do hereby accept service of above citation.

G. M. LAMBERTSON,
E. W. SIMERAL,
Att'ys for Defendant Wilkins.

Endorsed: No. 330, E. United States circuit court, district of Nebraska. John Elk *vs.* Charles Wilkins. Citation. Filed June 13, 1881. Watson B. Smith, clerk.

10 Thereupon afterwards, to wit, on the 13th day of June, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

11 Know all men by these presents that we, P. L. Perine, of Omaha, Douglas county, Nebraska, and Willis M. Yates, of Omaha, Douglas county, Nebraska, are held and firmly bound unto Charles Wilkins, of Omaha, in Douglas county, State of Nebraska, in the full and just sum of three hundred dollars, to be paid to the said Charles Wilkins, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between JohnElk, plaintiff, and Charles Wilkins, defendant, judgment was rendered against the said John Elk, plaintiff, and the said John Elk, plaintiff, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Wilkins, defendant, citing and admonishing — to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next.

Now the condition of the above obligation is such, that if the said John Elk, plaintiff, shall prosecute said writ of error to effect, and answer all costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

P. L. PERINE,
WILLIS M. YATES.

Approved by—
ELMER S. DUNDY, *Judge.*

Endorsed: No. —, United States circuit court, district of Nebraska. John Elk *vs.* Charles Wilkins. Bond. Filed June 13, 1881. Watson B. Smith, clerk.

12 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to eleven contain true and faithful transcripts from the pleadings, process, and proceedings of record, and on file in my office as said clerk, in the case of John Elk, plaintiff, *vs.* Charles Wilkins, defendant; and that a copy of the writ of error and citation have been lodged and the same remain on file in my said office.

Witness my hand and the seal of said court, at Omaha, this 26th day of July, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

Endorsed on the cover: Nebraska C. C. U. S. No. 305. John Elk, plaintiff in error, *vs.* Charles Wilkins. Filed 24th September, 1881.

112-94

SUPREME COURT U.S.
FILED
APR 1 1894
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN ELK,
Plaintiff in Error,

vs.

CHARLES WILKINS,
Defendant in Error.

BRIEF FOR PLAINTIFF.

OMAHA REPUBLICAN PRINT.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN ELK,

Plaintiff in Error,

vs.

CHARLES WILKINS,

Defendant in Error.

BRIEF FOR PLAINTIFF.

STATEMENT OF THE CASE.

This is an action for damages by the plaintiff against the defendant on the charge that the defendant, as a registration officer, under the election laws, willfully, maliciously and wrongfully refused to register the plaintiff, and thereby deprived him of the right of voting as an elector, at an election held in the City of Omaha, State of Nebraska, for the sole reason that the

plaintiff was an Indian and therefore not a citizen of the United States under the Fourteenth Amendment.

The petition avers, among other things, that the "plaintiff is "an Indian, and was born within the United States.

"That more than one year prior to the grievances hereinafter "complained of, he had severed his tribal relations to the Indi- "an tribes, and had fully and completely surrendered himself "to the jurisdiction of the United States, and still so continues "subject to the jurisdiction of the United States."

And avers "that under and by virtue of the Fourteenth "Amendment to the Constitution of the United States, he is a "citizen of the United States, and entitled to the rights and "privileges of citizens of the United States.

"That on the 6th day of April, 1880, there was held in the "City of Omaha, a city of the first class, incorporated under "the general laws of the State of Nebraska, providing for the "incorporation for cities of the first class, a general election."

"That the defendant, Charles Wilkins, held the office and "acted as Registrar in the Fifth Ward of said city, and that as "such Registrar it was the duty of said defendant to register "the names of all persons entitled to exercise the elective fran- "chise in said ward of said city at said general election.

"That this plaintiff was a citizen of and had been a *bona* "*fide* resident of the State of Nebraska, for more than six "months prior to said 6th day of April, 1880, and had been a "*bona fide* resident of Douglas County, wherein the City of "Omaha is situated, for more than forty days, and in the Fifth "Ward more than ten days prior to said 6th day of April, and "was such resident at the time of said election and at the time "of his attempted registration as hereinafter set forth, and was "in every way qualified under the laws of the State of Ne- "braska, and City of Omaha, to be registered as a voter and to "cast a vote at said election.

The petition further avers that the plaintiff presented him-

self to said registrar for registration and complied with all the provisions of the Statutes in that regard, "and claimed that "under the Fourteenth and Fifteenth Amendments to the Con- "titution of the United States, he was a citizen of the United "States, and was entitled to exercise the elective franchise re- "gardless of his race or color, and that said Wilkins, wilfully, "designedly, corruptly and maliciously, did then and there "refuse to register this plaintiff for the sole reason that the "plaintiff was an Indian, and therefore not a citizen of the United States, and not therefore entitled to vote," and with the wilful, malicious, corrupt and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights, and all other Indians, of their rights under said Fourteenth and Fifteenth Amendments to the Constitution of the United States.

"The petition further avers, among other things, that this "plaintiff presented himself at the proper place of voting and "requested the right to cast his ballot, and that said Wilkins, "then and there acting as one of the judges of said election, in "further carrying out his wilful and malicious design afore- "said, declared to the plaintiff and to the other election officers, "that the plaintiff was an Indian, and not a citizen, and not "entitled to vote, and said judges and clerks of election refused "to receive the vote of plaintiff for that he was not registered "as required by law."

To this petition there was filed a demurrer for the following reasons:

First—That the petition did not state facts sufficient to constitute a cause of action.

Second—The court had no jurisdiction of defendant.

Third—That the court had no jurisdiction of the subject matter of this action.

This demurrer was sustained by the court.

The plaintiff electing to stand upon his petition, judgment was rendered for the defendant accordingly.

ASSIGNMENT OF ERRORS.

Plaintiff assigns as error the sustaining of demurrer to petition and the entering of judgment of dismissal thereon.

Fourteenth Amendment to the Constitution, section 1:

"All persons born or naturalized in the United States and subject to "the jurisdiction thereof, are citizens of the United States, and of the "state wherein they reside."

CONSTITUTION OF THE STATE OF NEBRASKA,
ARTICLE VII.

SECTION 1. "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the State six months, and in the county, precinct or ward for the term provided by law, shall be an elector.

First.—Citizens of the United States.

Second.—Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election."

Chapter 26, of the Statutes of Nebraska, entitled Elections, Section 3:

"Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the State six months, in the county forty days, and in the precinct, township or ward ten days, shall be an elector.

First.—Citizens of the United States.

Second.—Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election."

Compiled Statutes of Nebraska, page 257.

Charter of cities of the first class, Section 14:

"The qualifications of electors in the several wards shall be the same as is required for electors in precincts under the laws of the State."

Compiled Statutes of Nebraska, page 85.

Omaha is a city of the first class.

Chapter 76, registration of voters, section 6, page 397:

"It shall be the duty of said officer of registration to enter in said register of qualified voters the name of every person who shall apply to him to be registered, and who shall satisfy him that he is qualified to vote under the provisions of the election laws of the state, or who shall prove

to his satisfaction that he will be of age, and so qualified to vote, on or before the day of the next ensuing election."

Compiled Statutes of Nebraska, page 397.

Section 13, Compiled Statutes of Nebraska, page 399:

"UNREGISTERED VOTERS DISQUALIFIED—CHALLENGE TO REGISTERED VOTER.—"The judges of election shall not receive or deposit the ballot of any person until they have first found his name on the list of qualified voters and have checked it thereon, and the same appearing on said list is sufficient evidence for the judges of election to receive and deposit the ballot, and no challenge shall be entertained."

Section 19, Compiled Statutes of Nebraska, page 399:

"APPLICATION OF ACT TO ALL ELECTIONS.—This act shall apply to municipal as well as county and state elections, and to special as well as general elections."

Under this record two questions are presented for consideration.

First.—Had the Circuit Court jurisdiction of this case.

Second:—Was the plaintiff a citizen of the United States under the Fourteenth Amendment to the Constitution.

JURISDICTION.

The suit was brought in the United States Circuit Court for the District of Nebraska, under section 1, of the Act of 1875, which provides among other things, that the Circuit Courts of the United States shall have original cognizance in all suits of a civil nature, arising under the constitution or laws of the United States.

The first question, therefore, is whether this suit is one arising under the Constitution of the United States.

The petition avers that the matter in dispute arises under the Constitution and laws of the United States, and further avers that the plaintiff is an Indian, and was born within the United States; that more than one year prior to the grievances

hereinafter complained of, he had severed his tribal relation to the Indian tribe, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States, and that under and by virtue of the Fourteenth Amendment to the Constitution of the United States, he is a citizen of the United States, and entitled to the rights and privileges of citizens of the United States.

The petition further avers that the plaintiff was deprived of the privilege of voting, for the sole reason that he was, and is an Indian, and therefore not a citizen of the United States, and not therefore entitled to vote.

It is true that the plaintiff may not be able to claim his right to vote under and by the virtue of the Fourteenth Amendment to the Constitution of the United States, as the right to vote may not be one of the immunities or privileges of citizenship. As the petition avers that he was deprived of this privilege, because he was not a citizen of the United States by reason of the fact that he was, and is, an Indian, it becomes necessary to inquire in the determination of this case, *the construction to be put upon the Fourteenth Amendment relating to citizenship.*

It being necessary, therefore, to inquire into the construction of the Fourteenth Amendment to the Constitution of the United States, in determining this litigation, is it therefore a case arising under the Constitution, within the meaning of those words in Section 1, of the act of 1875.

In *Tennessee vs. Davis,* 100 U. S., and on page 264, the court said:

"What constitutes a case thus arising, was early defined in the case "cited from 6th Wheaton. It is not merely one where the party comes "into Court to demand something conferred on him by the Constitution, "or by a law or a treaty."

"The case consists of the right of one party, as well as the other, and

"may truly be said to arise under the Constitution, or a law or a treaty "of the United States, when *its correct decision depends upon the construc-"tion of either.*"

In the case of *Cohens vs. Virginia*, 6 Wheaton, page 264, it was insisted that cases which arise under the Constitution must grow out of those provisions which are capable of self-execution. It was further insisted that a case which arises under a law of the United States, is a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example. But this view was not accepted.

Marshall, C. J., says:

"If it be to maintain that a case arising under the Constitution, or a "law, must be one in which the party comes into Court to demand some-"thing conferred on him by the Constitution or a law, we think the con-"struction too narrow."

"A case in law or equity consists of the right of the one party, as well "as of the other, and may truly be said to arise under the *Constitution* "or a law of the United States, when its *correct decision depends on the* "*construction of either.*"

In *Osborn vs. Bank*, 9 Wheat., 822, it is said the case arises under the Constitution, when "the title or right set up "by the party may be defeated by one construction of the Con-"stitution or laws of the United States or sustained by the op-"posite construction."

In the *Mayor vs. Cooper*, 6 Wall, 252, the Court said:

"Nor is it any objection that questions are involved which are not all "of a federal character. If one of the latter exist, if there be a single "such ingredient in the mass, it is sufficient. That element is decisive "upon the subject of jurisdiction. A case in law or equity consists of "the right of one party, as well as the other, and may be truly said to "arise under the Constitution or a law of the United States whenever its "correct decision depends upon the right construction of either."

"The rule applies with equal force where the plaintiff claims a right,

"and where the defendant claims protection, by virtue of one or the "other.

"It is the right and the duty of the National Government to have its "Constitution and laws interpreted and applied by its own Judicial tri- "bunals."

In Railroad Co. vs. Mississippi, 102 U. S., 139, the Court say:

"While the case raises questions which may involve the construction "of state enactments, and, also, perhaps, general principles of law, not "necessarily connected with any Federal question, the suit otherwise "presents a real and substantial dispute or controversy which depends "altogether upon the *construction* and effect of an act of Congress." * * *

"That a case in law of equity consists of the right of one party as well "as of the other, and may, properly, be said to arise under the Consitu- "tion or a law of the United States, whenever its correct decision de- "pends on the construction of either." * * *

"That it is not sufficient to exclude the judicial power of the United "States from a particular case, that it involves questions which do not at "all depend on the Constitution or laws of the United States; but when a "question to which the judicial power of the Union is extended by the "Constitution forms an ingredient of the original cause, it is within the "power of Congress to give the Circuit Courts jurisdiction of that cause, "although other questions of fact or of law may be involved in it."

Liability of Election Officers.—The general rule is, that and officer of election or of registration, who shall willfully and corruptly refuse to any citizen who is duly qualified, the right to vote or to register, is liable in damages to the person injured. McCrary on American Law of Elections, Page 367 to 377, and cases cited.

In some states it is not neccessary to show malice or willfulness on part of officer.

Killiam vs. *Ward*, 2 Mass., 236; *Lincoln* vs. *Hapgood*, 11 Mass., 370; *Henshaw* vs. *Foster*, 9 Pick, 312; *Capen* vs. *Foster*, 12 Pick, 485; *Jeffries* vs. *Ankeney*, 11 Ohio, 373; *Anderson* vs. *Milliken*, 9 Ohio St., 568; *Gillespie* vs. *Palmer*, 544.

CITIZENSHIP.

Fourteenth Amendment.—Section 1 of Fourteenth Amendment to Constitution of the United States provides "all persons

born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," etc. The petition avers that the plaintiff, although an Indian, was born in the United States, and was and is subject to the jurisdiction thereof, and therefore claimed his citizenship by virtue of this amendment, and that the registration and election officers refused to register him under the registry laws and to receive his vote, for the sole reason that Indians were not included within this amendment. We are led thus to inquire, what is the scope and meaning of this amendment.

AMENDMENTS INCLUDE INDIANS AS WELL AS AFRICANS.—It may be true that the spirit of the times that caused the adoption of the Thirteenth, Fourteenth and Fifteenth amendments to the Constitution, was one looking toward the establishment of freedom and citizenship for the late servile African race, and to make them secure from class legislation in the states, but it is most apparent that these amendments have a much broader compass and farther reaching effect. It would be a libel on the intelligence of the wise statesmen of those times to insist that they were making constitutional provisions for but one race or color, to the exclusion of all other classes or races who inhabit the country. The spirit of human liberty and human rights was the inspiring thought of the age, and it was planted on motives broad enough and grand enough to reach all classes and all races and all colors. We learn this, not only from the history of the times and the lives of the men who framed and secured the adoption of these amendments, but from the terms of the amendments in unmistakable language.

THE THIRTEENTH AMENDMENT provides "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

Here is a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government." It does not mean simply that there shall not exist slavery or involuntary servitude of the African race, and permit the existence of slavery of the white race or the Indian race. No lawyer or statesman would argue, in the face of this amendment, that the African race could constitutionally enslave the white race, or that the white race could constitutionally enslave the Indian race, [while it is a lamentable fact that the white race are subjecting the Indian race, in many respects, to involuntary servitude.] The simple statement of the proposition is as clear as a geometrical demonstration.

We are confirmed in this statement by the opinion of the Court in the Slaughter-House cases, 16 Wall., 72, where Justice Miller says:

"We do not say that no one else but the negro can share in this pro-
"tection. Both the language and spirit of these articles are to have their
"fair and just weight in any question of construction. Undoubtedly while
"negro slavery alone was in the mind of the Congress which proposed the
"thirteenth article, it forbids any other kind of slavery now or hereafter.
"If Mexican peonage or the Chinese coolie labor system shall develop
"slavery of the Mexican or Chinese race within our territory, this amend-
"ment may safely be trusted to make it void. And so if other rights are
"assailed by the states which properly and necessarily fall within the
"protection of these articles, that protection will apply, though the party
"interested may not be of African descent."

Field, J. (p. 90) says:

"It is not confined to African slavery alone. It is general and un-
"iversal in its application. Slavery of white men as well as of black men
"is prohibited, and not only slavery in the strict sense of the term, but
"involuntary servitude in every form."

Fourteenth Amendment.—What we have said as to the comprehensive meaning of the Thirteenth Amendment, is equally true of the Fourteenth Amendment. Prior to this time there had been great discussion among judges and statesmen whether there was any such thing as a citizen of the United

States separate and apart from citizenship of a state. In the celebrated *Dred Scott* case it had been held that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States.

In the opinion of Judge Taney, 19 How., 420, was the dictum :

"Congress might, as we before said, have authorized the naturaliza-"tion of Indians, because they were aliens and foreigners. But, in their "then untutored and savage state, no one would have thought of admit-"ting them as citizens in a civilized community. And, moreover, the "atrocities they had but recently committed, when they were the allies of "Great Britain in the revolutionary war, were yet fresh in the recollection "of the people of the United States, and they were even then guarding "themselves against the threatened renewal of Indian hostilities. No "one supposed then that any Indian would ask for, or was capable of "enjoying the privileges of an American citizen, and the word white was "not used with any particular reference to them."

To overturn this opinion "and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States, and also citizenship of a state," the first clause of the Fourteenth Amendment provides :

"All persons born or naturalized in the United States and subject to "the jurisdiction thereof, are citizens of the United States and of the "state wherein they reside."

Of this section, Justice Miller says : [Slaughter-House cases, p. 73.]

"It declares that persons may be citizens of the United States with-"out regard to their citizenship of a particular state, and it overturns the "Dred Scott decision by making *all persons*, born within the United "States and subject to its jurisdiction, citizens of the United States."

It is not a declaration that the African race, or the white race or the Indian race are clothed with citizenship. If it was adopted for the African race alone, then they would be possessed of great constitutional rights, not possessed by the white

race. It means just what it says, that *all persons,* regardless of race or color, possessed of the qualifications described, are citizens of the United States.

Justice Swayne [p. 129, Slaughter-House cases], says of this amendment :

"This court has no right to interpolate a limitation that is neither ex-
"pressed nor implied. Our duty is to execute the law, not to make it.
"The protection provided was not intended to be confined to those of any
"particular race or class, but to embrace equally all races, classes and
"conditions of men."

Civil Rights Act.—Prior to the adoption of the 14th amendment, Congress had passed the Civil Rights Bill of 1866, which defined citizenship of the United States as follows :

"All persons born in the United States and not subject to the jurisdic-
"tion of any foreign power [excluding Indians not taxed], are hereby de-
"clared citizens of the United States."

Here was a declaration that all persons born in the United States, are citizens of the United States, if they be not subject to the jurisdiction of a foreign power, excluding Indians not taxed. It was not the purpose at this time to declare all Indians to be citizens. Indians were not and are not a foreign power, nor are they subject to the jurisdiction of a foreign power. Such was determined in the *Cherokee Nation vs. Georgia*, 5 Peters, 1.

If the phrase, excluding Indians not taxed, had been omitted from the bill, it, by its terms, would have made all native born Indians citizens of the United States. Congress foresaw that the language of such an act must be construed according to the plain meaning of the terms used, and that it would not do to say of such a bill, that Indians were to be excluded from its provisions, if there were no words employed to indicate such purpose. Accordingly we find, inserted in parentheses, the phrase, "excluding Indians not taxed." The intention of the law now be-

came manifest. Certain Indians were not declared to be citizens. What Indians? Indians not taxed. It is equally apparent that this language was not intended to exclude *all* Indians, because the language is confined to particular Indians. Indians not taxed were excepted from citizenship, but all other Indians, or Indians who were taxed were declared to be citizens. What proportion of the whole Indian people were not taxed and therefore not citizens under the Civil Rights Bill, and what proportion were taxed, and declared to be citizens, it is not necessary to inquire. We are urging the two facts. First that under the Civil Rights Bill, there was an Indian citizenship, and second, that untaxed Indians were not citizens.

It may also be observed that the feature of Indian citizenship did not depend upon the tribal relation, as some authorities now argue that it does under the Fourteenth Amendment. The Civil Rights Bill ignored the tribal relation and made citizenship depend upon taxation. Any Indian who so located himself as to be taxed or became possessed of property subject to taxation, became under the law, a citizen of the United States. Here was an avenue opened up through which all the Indians of the land could travel to citizenship.

Soon afterward comes the Fourteenth Amendment which defined citizenship, and the phraseology is changed a little, and the words, "excluding Indians not taxed" are omitted. Why this omission. We already had Indians who were citizens, by reason of taxation. We are also aware that Congress had made certain Indians citizens by special acts, and the same had been brought about by treaty. Was it the purpose of this amendment to destroy this citizenship, to take from a large number of our people what the constitutional makers deemed the greatest boon of man? And that too, by a class of statesmen who were moved by the burning spirit of human liberty and human rights? If it had been intended to exclude the Indian race, they would have inserted the words, *excluding Indians*. Why

were not the words from the Civil Rights Bill, "*excluding Indians not taxed*" inserted in the amendment? It evidently was the purpose to make a step in advance of the Civil Rights Bill. Citizenship was no longer to depend upon taxation. It was not so of any other race or class and why have it so of the Indian! We think it therefore clear, that when the Fourteenth Amendment is viewed in the light of the Civil Rights Bill which had preceded it, there was no purpose to exclude Indians, but rather to include native born Indians as citizens of the United States.

SENATE DEBATE.

When the Fourteenth Amendment was under consideration in the Senate, a discussion arose, whether it did not make all Indians citizens, and it was sought to so amend it, as to exclude tribal Indians. A review of that discussion will show a common purpose to make citizens, all Indians who had abandoned tribal relations.

Senator Howard, of Michigan, May 30, '66, offered as amendment to section 1 :

"All persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Cong. Globe, 1st Sess. 39 Cong., Page 2890.

Mr. Doolittle believed that the language of this amendment would include all Indians and sought to have it amended. Mr. Doolittle said :

"I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment—I presume he will have no objection to it—by inserting after the word 'thereof' the words '*excluding Indians not taxed.*'"

The amendment would then read :

"All persons born in the United States, and subject to the jurisdiction

thereof, *excluding Indians not taxed*, are citizens of the United States and of the States wherein they reside."

Cong. Globe, 1st Sess. 39 Cong., Page 2890.

Again Mr. Doolittle said among other things:

"I moved this amendment because it seems to me very clear that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. * * * *

"In my own state there are the Chippewas, the remnants of the Winnebagoes and the Pottawatomies. There are tribes in the State of Minnesota and other states of the Union.

"Are these persons to be regarded as citizens of the United States, and by a constitutional amendment declared to be such, because they are born within the United States and subject to our jurisdiction."

Mr. Trumbull, Chairman of Judiciary Committee, thought the amendment proposed by Doolittle unnecessary, not because the language did not include Indians who had severed their tribal relation, but because it did not include tribal Indians. He said:

"Of course my opinion is not any better than that of any other member of the Senate; but it is very clear to me that there is nothing whatever in the suggestions of the Senator from Wisconsin. The provision is, that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens.

"That means, "subject to the complete jurisdiction thereof." Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. That is what it means." * * *

And again:

"If you introduce the words "not taxed," that is a very indefinite expression. What does "excluding Indians not taxed" mean? You will have just as much difficulty in regard to those Indians that you say are in Colorado, where there are more Indians than there are whites."

"Suppose they have property there, and it is taxed; then they are citizens."

Mr. Wade. "And ought to be."

Mr. Trumbull. "The Senator from Ohio says they ought to be. If they are there, and within the jurisdiction of Colorado, and subject to

the laws of Colorado, they ought to be citizens; and that is all that is proposed." * * *

And again:

"It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens."

Cong. Globe, 1st Sess., 39th Cong., page 2893.

Mr. Johnson, of Maryland, said:

"I am not objecting at all to their being citizens now; what I mean to say, is that over all the Indian tribes within the limits of the United States, the United States may—that is the test—exercise jurisdiction. Whether they exercise it in point of fact is another question; whether they propose to govern them under the treaty-making power is quite another question; but the question as to the authority to legislate is one, I think, about which, if we were to exercise it, the courts would have no doubt; and when, therefore, the courts come to consider the meaning of this provision, that all persons born within the limits of the United States, and subject to the jurisdiction thereof are citizens, and are called upon to decide whether Indians born within the United States, with whom we are now making treaties are citizens, I think they will decide that they have become citizens, by virtue of this amendment."

Cong. Globe, 1st Sess., 39th Cong., page 2893.

Mr. Trumbull in response to Mr. Johnson said, among other things:

"But the Senator wants to insert the words, "excluding Indians not taxed." I am not willing to make citizenship in this country depend on taxation. I am not willing, if the Senator from Wisconsin is, that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen. If you put in those words in regard to citizenship, what do you do? You make a distinction in that respect, if you put it on the ground of taxation. We had a discussion on the Civil Rights Bill as to the meaning of these words, "excluding Indians not taxed." The Senator from Maryland, (Mr. Johnson) I think, on that occasion gave this definition to the phrase "excluding Indians not taxed," that it did not allude to the fact of taxation simply, but it meant to describe a class of persons, that is, civilized Indians. I was inclined to fall into that view. I was inclined to adopt the suggestion of the Senator from Maryland that the words, "excluding Indians not taxed" did not mean literally excluding those

upon whom a tax was not assessed and collected, but rather meant to define a class of persons, meaning civilized Indians; and I think I gave that answer to the Senator from Indiana, (Mr. Hendricks) who was disposed to give it the technical meaning that "Indians not taxed" meant simply those upon whom no tax was laid. If it does mean that, then it would be very objectionable to insert those words here, because it would make of a wealthy Indian a citizen and would not make a citizen of one not possessed of wealth under the same circumstances."

"This is the uncertainty in regard to the meaning of those words. The Senator from Maryland and myself, perhaps, would understand them alike as embracing all Indians who were not civilized; and yet, if you insert that language, "Indians not taxed," other persons may not understand them that way; and I remember that the Senator from Indiana was disposed to understand them differently when we had the discussion upon the Civil Rights bill. Therefore I think it better to avoid these words and that the language proposed in this constitutional amendment is better than the language in the Civil Rights bill. The object to be arrived at is the same."

Cong. Globe. 1st Sess., 39th Cong., page 2894.

Mr. Hendricks insisted that all Indians were subject to the power of Congress and would be made citizens by this amendment, and said:

"If the Indian is bound to obey the law, he is subject to the jurisdiction of the country; and that is the question I desired the Senator to meet as a legal question, whether the Indian would be bound to obey the law which Congress in express terms extended over him in regard to questions within the jurisdiction of Congress.

"Now, sir, this question has once or twice been decided by the Attorney General, so far as he could decide it. In 1855 he was inquired of whether the laws of the United States regulating the intercourse with the Indian tribes, by the general legislation in regard to Oregon, had been extended to Oregon; and he gave it as his opinion that the laws had been extended to Oregon, and regulated the intercourse between the white people and the Indians there. Subsequently, the Attorney General was asked whether Indians were citizens of the United States in such sense as that they could become the owners of the public lands where the right to acquire them was limited to citizens; and in the course of that opinion he says that the Indian is not a citizen of the United States by virtue of his birth, but that he is a subject. He says:

"'The simple truth is plain that the Indians are the subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this

Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government. This distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law.'

"He then cites some authorities. Again, he says:

"'Not being citizens of the United States by mere birth, can they become so by naturalization? Undoubtedly.

"'But they cannot become citizens by naturalization under existing general acts of Congress. (2 Kent's Comentaries, page 72.)

"'Those acts apply only to foreigners, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance without being citizens of the United States.'

Mr. Johnson. "Whose opinion is that?"

Mr. Hendricks. "That is the opinion of Mr. Cushing, given on the 5th of July, 1856." * * * *

Again he said:

"If it is the pleasure of Congress to make the wild Indians of the desert citizens, and then if three-fourths of the states agree to it, I presume we will get along the best way we can; and what shall then be the relations between these people and the United States will be for us and our descendants to work out. They are not now citizens; they are subjects. For safety, as a matter of policy, we regulate our intercourse with them to a large extent by treaties, so that they shall assent to the regulations that govern them. That is a matter of policy, but we need not treat with an Indian. We can make him obey our laws, and being liable to such obedience he is subject to the jurisdiction of the United States."

Cong. Globe, 1st Sess. 39 Cong., Page 2895.

Mr. Howard said:

"But the great objection to the amendment to the amendment is that it is an unconscious attempt on the part of my friend from Wisconsin to naturalize all the Indians within the limits of the United States. I do not agree to that. I am not quite so liberal in my views.

"I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens, and go to the polls and vote with me, and hold lands and do all in every way that a citizen of the United States has a right to do."

Cong. Globe, 1st Sess., 39th Cong., page 2895.

Said Mr. Doolittle, again:

"The opinion of Attorney-General Cushing, one of the ablest men

who has ever occupied the position of Attorney-General, has been read here, in which he states clearly that the Indians, though born upon our soil, owing us allegiance, are not citizens; they are our subjects; and that is the very word which is used in this amendment proposed to the Constitution of the United States, declaring that if they be 'subject' to our jurisdiction, born on our soil, they are *ipso facto* citizens of the United States.".

Cong. Globe., 1st Sess., 39th Cong., page 2896.

And again Mr. Doolittle said:

"The immediate question is whether the language which he uses, 'all persons subject to the jurisdiction of the United States,' includes these Indians. I maintain that it does; and, therefore, for the purpose of relieving it from any doubt, for the purpose of excluding this class of persons, as they are, in my judgment, utterly unfit to be citizens of the United States, I have proposed this amendment, which I borrow from the Constitution as it stands, which our fathers adopted more than seventy years ago, which I find also in the Civil Rights bill which passed this present Congress, and which I find also in the second section of this Constitutional Amendment, when applied to the enumeration of the inhabitants of the States.

"I insist that it is just, proper in every way, but reasonable that we exclude the wild Indians from being regarded or held as citizens of the United States,"

Cong. Globe, 1st Sess., 39th Cong., Page 2897.

Mr. Williams said:

"I would not agree to this proposed Constitutional Amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. The first and second sections of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word 'citizens,' as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. Section one provides that

"All persons born in the United States, and subject to the jurisdic-
"tion thereof, are citizens of the United States and of the State wherein
"they reside.

"If there be any doubt about the meaning of that paragraph, I think that doubt is entirely removed by the second section, for by the second section of this Constitutional amendment, Indians not taxed are not counted at all in the basis of representation. The words in the second section are as follows:

"Representatives shall be apportioned among the several States

"which may be included within the Union, according to their respective "numbers, counting the whole number of persons in each State, exclud- "ing Indians not taxed.

"They are not to be regarded as persons to be counted under any circumstances. Indians not taxed are not even entitled to be counted as persons in the basis of representation under any circumstances; and then the section provides,

"But whenever, in any State, the elective franchise shall be denied to "any portion of its male inhabitants, being citizens of the United States, "etc."

"Now, can any reasonable man conclude that the word, 'citizens' there applies to Indians not taxed, or includes Indians not taxed, when they are expressly excluded from the basis of representation and cannot even be taken into the enumeration of persons upon whom representation is to be based? I think it is perfectly clear, when you put the first and second sections together, that Indians not taxed are excluded from the term 'citizens,' because it cannot be supposed for one moment that the term 'citizens' as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis of representation. I therefore think that the amendment of the Senator from Wisconsin is clearly unnecessary."

"I do not believe that 'Indians not taxed' are included, and I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States."

Cong. Globe, 1st Sess., 39 Cong., page 2897.

Mr. Saulsbury said:

"I have no doubt myself of the correctness of the position, as a question of law, taken by the honorable Senator from Wisconsin; but, sir, I feel disposed to vote against his amendment, because if these negroes are to be made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens. If our citizens are to be increased in this wholesale manner, I cannot turn my back upon that persecuted race, among whom are many intelligent, educated men, and embrace as fellow-citizens the negro race. I therefore, as at present advised, for the reasons I have given, shall vote against the proposition of my friend from Wisconsin, although I believe, as a matter of law, that his statements are correct."

Cong. Globe, 1st Sess., 39 Cong., page 2987.

The vote on the amendment to the amendment to inset the words "excluding Indians not taxed" is shown by the follow-

ing extracts from Cong. Globe, 1st Sess. 39 Cong., Page 2897:

The President *pro tempore*. "The question is on the amendment of the Senator from Wisconsin to the amendment proposed by the Senator from Michigan."

Mr. Doolittle. "I ask for the yeas and nayes on that question."

The yeas and nays were ordered.

Mr. Van Winkle. "I desire to have the amendment to the amendment read."

The Secretary read the amendment to the amendment, which was to insert after the word "thereof" in the amendment the words "excluding Indians not taxed;" so that the amendment, if amended, would read:

"All persons born in the United States, and subject to the jurisdic-"tion thereof, excluding Indians not taxed, are citizens of the United "States and of the states wherein they 'reside.'"

The question being taken by yeas and nays, resulted—yeas, 10; nays, 30; as follows:

YEAS—Messrs. Buckalew, Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Norton, and Riddle—10.

NAYS—Messrs. Anthony, Clark, Conness, Cragin, Creswell, Edmunds, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Kansas, Morgan, Morrill, Nye, Poland, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Trumbull, Van Winkle, Wade, Willey, Williams, and Wilson—30.

ABSENT—Messrs. Brown, Chandler, Dixon, Lane of Indiana, Nesmith, Salisbury, Sprague, Wright, and Yates—9.

So the amendment to the amendment was rejected.

INDIANS SUBJECT TO THE JURISDICTION OF THE UNITED STATES.—We are met by the argument that the Indians are not included in the Fourteenth Amendment, because they are not subject to the jurisdiction of the United States.

This proposition opens up a wide field for thought and discussion, and the searcher after truth will meet with a diversity of opinions upon the subject. For the purpose of this case, it is unnecessary to enter upon an argument of this general subject.

The most that is contended for against us, is that Indians owe a divided allegiance, partly to the Government of the United States and partly to the Indian tribe. Accepting this to be true, we have a large class of Indians to whom it does not apply.

As long ago as the case of *Fletcher vs. Peck*, 6 Cranch, 87, Johnson, J., said:

"Some have totally extinguished their national fire, and submitted "themselves to the laws of the states."

The Supreme Court has decided in *United States vs. Joseph*, 4 Otto, 614, that the Pueblo Indians are not tribal Indians. The fact that the government may have an Indian agent in charge, does not of itself determine the character of the Indians. Says Justice Miller in above case:

"We have no hesitation in saying that their *status* is not in the face of "the facts we have stated, to be determined solely by the circumstance "that some officer of the government has appointed for them an agent."

Cherokee Tobacco case, 11 Wall., 616:

"It is our duty to expound and execute the law as we find it, and we "think it too firmly and clearly established to admit of dispute that the "Indian tribes residing within the territorial limits of the United States, "are subject to their authority, and where the country occupied by them "is not within the limits of the states, Congress may by law punish any "offense committed there, no matter whether the offender be a white "man or an Indian."

"Both these propositions are so well settled in our jurisprudence that "it would be a waste of time to discuss them or to refer to further "authorities in their support."

Congress seems disposed to hasten the destruction of the tribal or national character of Indians as if to open the way to their recognition as part and parcel of our people. Witness the act of March 3, 1871, Sec. 2079.

"No Indian nation or tribe within the territory of the United States, "shall be acknowledged or recognized as an independent nation, tribe or "power with whom the United States may contract by treaty; but no ob- "ligation of any treaty lawfully made and ratified with any such Indian, "nation or tribe prior to March 3d, 1871, shall be hereby invalidated or "impaired"

Henceforth, no more treaties with Indians are to be made. There is to be no recognition by the government of any

tribe of Indians in their tribal or national character, save those now under existing treaties. All Indians not under treaty relations to the government, are to be recognized as only so many individuals. To all such, what becomes of the argument that they are not subject to the jurisdiction of the United States? To them, we recognize no power to whom they owe allegiance, save to the United States.

NON-TRIBAL-INDIANS.—For the purposes of the present case it is only necessary to inquire into the attitude of non-tribal Indians under the Fourteenth Amendment. By a resolution of the Senate of the United States, April 7th, 1870, the committee on judiciary were instructed to "inquire into and report to the senate, "the effect of the Fourteenth Amendment to the Constitution "upon the Indian tribes of the country; and whether by the "provisions thereof the Indians are not citizens of the United "States; and whether thereby the various treaties heretofore ex- "isting between the United States and the various Indian "tribes are, or not, annulled."

In the report of that committee, made by the Hon. Matt. H. Carpenter, is found this language:

"It is pertinent to say in concluding this report, that treaty relations "can properly exist with Indian tribes or nations only, and that, when "the members of a tribe are scattered, they are merged in the mass of "our people, and become equally subject to the jurisdiction of the United "States."

Judge Cooley, in his edition of Story on the Constitution, has taken occasion to consider the effect of the Fourteenth Amendment upon the Indian race, and on page 655, vol. 2, says:

"When, however, the tribal relations are dissolved, when the head-hip "of the chief or the authority of the tribe is no longer recognized, and "the individual Indian, turning his back upon his former mode of life, "makes himself a member of the civilized community, the case is wholly "altered: He then no longer acknowledges a divided allegiance; he joins "himself to the body politic; he gives evidence of his purpose to adopt "the habits and customs of civilized life; and as his case is then within

"the terms of this amendment, it would seem that his right to protec-
"tion, in person, property and privilege, must be as complete as the
"allegiance to the government to which he must then be held; as com-
"plete, in short, as that of any other native born inhabitant."

Ex parte Kenyon, 5 Dillon, 390, the Court says:

"When the members of a tribe of Indians scatter themselves among
"the citizens of the United States, and live among the people of the
"United States, they are merged in the mass of our people, owing com-
"plete allegiance to the Government of the United States, and of the
"state where they may reside, and, equally with the citizens of the
"United States and of the several States become subject to the jurisdic-
"tion of the courts thereof."

Here is then weighty authority, that when the tribal relation is extinguished, Indians are as much subject to the jurisdiction of the United States as other native born inhabitants and by force of the constitution are citizens of the United States. They then stand in the same attitude as the native born African or emancipated slave, and the citizenship of the latter is unquestioned.

Expatriation of Indians.—The petition alleges that the plaintiff had severed his tribal relation, and submitted himself to the jurisdiction of the United States. Had he the right to go out and cast aside whatever allegiance he owed to his tribe, if there can be such a thing as a native born Indian owing an allegiance to an Indian tribe within the jurisdiction of the United States, which in any wise limits or curtails the allegiance which he owes to the United States?

This question was before his Honor, Judge Dundy, in *United States vs. Crook*, 5 Dillon, 454, and we take the liberty of quoting from his able opinion:

"If Indian tribes are to be regarded and treated as separate but depend-
ent nations, there can be no serious difficulty about this question. If they
are not to be regarded and treated as separate dependent nations, then no
allegiance is owing from an individual Indian to his tribe, and he could,
therefore, withdraw therefrom at any time. The question of expatria-

tion has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy "has triumphantly secured the right to every person found within our ju-"risdiction. This right has always been claimed and admitted by our gov-"ernment, and it is now no longer an open question. It can make but lit-"tle difference then, whether we accord to the Indian tribes a national "character or not, as in either case, I think the individual Indian posses-"ses the clear and God-given right to withdraw from his tribe and for-"ever live away from it, as though it had no further existence. If the "right of expatriation was open to doubt in this country down to the year "1868, certainly since that time no sort of question as to the right can now "exist. On the 27th of July of that year, Congress passed an act, now appearing as Sec. 1999 of the revised statutes, which declares that: "'Whereas, the right of expatriation is a natural and inherent right of "all people, indisputable to the enjoyment of rights of life, liberty, and the "pursuit of happiness; and, whereas, in the recognition of this princi-"ple, the government has freely received emigrants from all nations, and "invested them with the rights of citizenship. * * * * * * Therefore, any declaration, instruction, opinion, order or de-"cision of any officer of the United States which denies, restricts, im-"pairs or questions the right of expatriation, is declared inconsistent "with the fundamental principles of the republic.' This declaration "must forever settle the question until it is re-opened by other legislation "upon the same subject. This is, however, only re-affirming in the most "solemn and authoritative manner, a principle well settled and under-"stood in this country for many years past."

A similar statement of the right of an Indian to expatriate himself from his tribe was announced by the Supreme Court in the Dred Scott case, page 404, 19th How.

"But they may, without doubt, like the subjects of any for-"eign government, be naturalized by the authority of Congress, "and become citizens of a state, and of the United States; and if "an individual should leave his nation or tribe, and take up his abode "among the white population, he would be entitled to all the rights and "privileges which would belong to an emigrant from any other foreign "people."

This announcement was long prior to the statute of 1868, cited in the opinion of Judge Dundy. It was announced by Judge Taney as a common law right, and if a common law

right, how much less can it be questioned since the act of Congress referred to.

NATURALIZATION OF INDIANS.—It may be true that in the times of Judge Taney, an expatriated Indian did not *per se* become a citizen of the United States, but was in the same situation as an expatriated alien. Since the adoption of the Fourteenth Amendment, things have changed as to citizenship. An expatriated alien does not become a citizen of the United States by reason of his expatriation alone. Naturalization is still necessary. Aliens are not persons born in the United States, while our native Indians are born in the United States, and as to them, naturalization is unnecessary. Their citizenship depends upon birth and not upon naturalization. The Fourteenth Amendment has made this discrimination, and the people and the courts must bow to it.

Why should Indians be naturalized? Is it because they belong to a colored race? Scid Swayne, J., in *United States v. Rhodes*, 7 Am. L. R., 237.

"The common law has made no distinction on account of race or color. None is now made in England nor in any other Christian country in Europe."

And again on same page:

"We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor and subject only to the same exceptions, since as before the revolution. It is further said in the note in 2 Kent's Commentaries, before referred to: "If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforth a citizen, but under such disabilities as the laws of the several states may deem it expedient to prescribe to persons of color." And again: "We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disabilities of slavery made him a citizen."

Slaves were not citizens because they were treated as a species

of property and not as persons. Emancipation destroyed the property idea and the person appeared. This disability was gone, and under the sunlight of the Civil Rights bill and next under the 14th amendment he blossomed into citizenship. The thought that naturalization was necessary, never entered the minds of the American statesmen. What is naturalization? It is the removal of the disabilities of alienage. What is alienage? It is allegiance to a foreign power. The Supreme Court has said that Indian tribes are not foreign nations. As emancipation was the removal of the incapacity of slavery, so expatriation of an Indian would be the removal of the tribal incapacity, and as the Indian as well as the negro, was born in the United States, they become citizens without naturalization.

Pashal, in his annotated Constitution, p. 276, in speaking of the power of naturalization, says:

"It is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen is not naturalization, and cannot be brought within the exercise of that power. There is an universal agreement of opinion on this subject."

CONCLUSION.—The Supreme Court has found in the history of the times strong reasons why the 14th amendment was adopted as a means for elevating the African into citizenship.

In Slaughter-House cases [p. 70.] the Court say:

"Among the first acts of Legislation adopted by several of the states in the Legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race enormous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

"They were in some states forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a

party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

Are there not reasons equally strong why the Indians need protection, and is that protection to be found in anything less powerful than the shield of these Constitutional Amendments?

From a late report of the Indian Commissioner we learn that there are 255,938 Indians in the United States; that in the year 1880, they cultivated 482,730 acres of land; they raised 4,-044,848 bushels of grain and 970,843 bushels of vegetables; and owned of sheep, horses, cattle and swine, 1,993,464 head.

"During the year, sixty boarding and one hundred and ten day schools have been in operation among the different Indian tribes, [exclusive of the five civilized tribes in the Indian Territory,] which have been attended by over 7,000 children and taught by 338 teachers."

What foreign element that we welcome to our shores, with hospitable hands, in the tide of immigration, can equal this record? The time has gone by to shut the doors of justice against the Indian race on the plea that they are savages.

In 1879 a United States Senator, who had investigated the Indian question as chairman of an Indian committee, on the floor of the Senate, said of the Indians:

"All of whom are capable of civilization, many of whom are as well prepared for citizenship as hundreds of thousands of white and colored people who now enjoy that inestimable boon."

Such is the race, whose cause we plead, and we do it, because of the wrongs and oppressions, and *involuntary servitude* they have suffered, at the hands of the people and the government.

"The white man's treatment of the Indian is one of the great sins of civilization, for which no single generation or nation is wholly answerable, but which it is now too late to redress. Repentance is all that is left for us; restitution is impossible. But the harsh treatment of

the race by former generations should not be considered a precedent for further wrongs-"—*Report Senate Judiciary Committee, December 14, 1870.*

A prominent journalist has pointedly stated the case by an inquiry:

"Have the Indians an absolute monarch over them in the person of the commissioner in Washington, who can say to any one of them come, and he must come; and go and he must go, and who can say to a man plowing in the field, "take your wife and little children and go to a pest hole of sickness and stay there until you die," and if he refuse to go, has the power to command the army to force him there at the point of the bayonet?"

The first question has been answered by the Supreme Court of Kansas.

"Nothing but a law would avail as a justification for arresting and imprisoning a man."

"His (Indian's) rights are regulated by law, and when he appeals to the law for redress, it is not in the power of any tribunal to say, "you are an Indian, and your rights rests in the arbitrary decrees of executive officers and not in the law."

The second question has been answered in the negative by the Standing Bear case, but the unlawful practice goes on as before.

What is the remedy? We answer: CITIZENSHIP.

"Year by year the tightening coils of civilization, like a great anaconda, have encircled the Indians until there is no possibility of their escaping annihilation except through absorption into civilzation and citizenship." (Speech of Senator Saunders in the senate, Feb. 12, 1879.)

A voice comes from the Indian Territory, where the Pawnees and Poncas and Cheyennes buried one-fourth their entire number in a single year, in that Indian prison house, worse than a Libby or an Andersonville, a pest hole of death to northern tribes, saying to the courts, give us citizenship.

The massacred men and women and children of the Cheyennes, at that Thermopylae of the Indian race upon the soil

of Nebraska, speak unanswerable words in behalf of citizenship.

When the courts extend the mantle of the constitution over this fading and long suffering people, it shall be as the announcement of divine justice from the temples of human wisdom.

A. J. POPPLETON,
JNO. L. WEBSTER,
Attorneys for Plaintiff.

112-94

In the Supreme Court of the United States

OF AMERICA.

JOHN ELK,

Plaintiff in Error,

vs.

CHARLES WILKINS,

Defendant in Error.

Brief and Argument of Defendant in Error.

G. M. LAMBERTSON,

Attorney for Defendant.

In the Supreme Court of the United States

OF AMERICA.

JOHN ELK,

Plaintiff in Error,

vs.

CHARLES WILKINS,

Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT.

The petition alleges that plaintiff in error, John Elk, an Indian, one year ago severed his tribal relations and voluntarialy surrendered himself to the jurisdiction of the United States, sought to have himself registered as a voter and to vote at a municipal election in the city of Omaha, in the month of April, A. D. 1880, but the defendant as registrar and one of the judges of election, refused either to register his name as a voter, or receive his vote, on the ground that he was an Indian and therefore not a citizen of the United States. To this petition the defendant filed a demurrer on the grounds, First, The petition fails to set out sufficient facts to constitute a cause of action. Second, The court has no jurisdiction of the subject matter of the petition. Third, The court is without jurisdiction of the parties to the suit.

The only question raised by defendants' demurrer to plaintiff's petition that we care to discuss, and upon which the opinion of the court is desired, is the question whether an Indian who claims to have severed his tribal relations and submitted himself to the jurisdiction of the United States is entitled to vote at a municipal election in Nebraska.

I.

CITIZENSHIP OF TRIBAL INDIANS.

The constitution of the State of Nebraska, Article VII, Section 1, provides the qualification of voters in the following words:

"Every male person of the age of twenty one years or upwards, "belonging to either of the following classes, who shall have resided "in the state six months, and in the county, precinct or ward for the "term provided by law, shall be an elector. First, Citizens of the "United States. Second. Persons of foreign birth, who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election."

The right of plaintiff to vote was denied because he was an Indian and not a citizen

The question, therefore, is then fairly raised whether Indians are citizens under our constitution and laws.

Aristotle defines a citizen, in his third book of politics, as one who is a partner in the legislative and judicial functions of government.

Chief Justice Taney says: "A citizen is one who takes an active part in the affairs of state. He is a producer and consumer."

Cooley defines a citizen as: "A person owing allegiance to the government and entitled to its protection."

The civil rights act passed by congress in the year 1866, provides that "all persons born in the United States and not subject to the jurisdiction of any foreign power, excluding Indians not taxed, are hereby declared citizens of the United States."

Section I of the XIV Amendment to the Constitution of the United States declares that all persons born or naturalized in the United

States and subject to the jurisdiction thereof, are citizens of the United States."

Under neither of the above definitions of the law writers, or the provisions of our law can Indians sustaining tribal relations claim to be recognized as citizens of the United States.

That the Indians since the foundation of our government have been regarded as outside its jurisdiction is shown by that clause in the Declaration of Independence which arraigns the King of Great Britain, because "he endeavored to bring upon the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions."

The constitution recognizes the Indian tribes as independent nations and communities when it empowers congress "to regulate commerce with foreign nations, among the several states and with the Indian tribes."

"This clause," says Chief Justice Marshall in the case of Cherokee Nation vs. State of Georgia, clearly contradistinguishes by a name appropriate to themselves the Indians from foreign nations, and from the several states composing the Union. The objects to which the power regulating commerce might be directed, are divided into three distinct classes, foreign nations, the several states, and Indian tribes. When framing the article, the convention considered them as entirely distinct."

All the decisions are to the same effect that the Indian tribes are seperate nations, independent political communities, and only in a very limited sense subject to our jurisdiction.

Cherokee Nation vs. State of Georgia, 5 Peters 16

Worcester vs. State of Georgia, 5 Peters 515

Holden vs. Joy, 17 Wallace 242

In the face of three hundred and eighty-two treaties with Indian tribes, ratified by the senate as are treaties with foreign powers, we can reach but one conclusion, that the Indian tribes have a government of their own separate and distinct from that of the United States.

See book of Francis Walker on the Indian Question, p. 114.

Mr. Carpenter in a report made by the judiciary committee of the senate, December 14th, 1870, reviewing the policy of the government in its relations to the Indian tribes, the various treaties, and the decisions of the courts delivers the opinion of the committee that the Indian tribes are distinct political communities unaffected by our municipal laws.

Again in the first treaty with the Delewares and the Creeks, the individuals composing these tribes or nations are designated as citizens respectfully of the Deleware and Creek nations.

Judge Dillon speaking of the Pawnee Indians in Nebraska, says: "They are already in the midst of a white population, but do not enjoy any of the political, or many of the civil rights of the latter."

United Stated vs. Yellow Sun, 1 Dill. 271.

In a Minnesota case, the court says: "The intestate Indian chief, Hole-in-the-Day, was not a citizen of the United States, nor of the state of Minnesota, but belonged to a separate nation, upon which the laws of the state could have no force."

United States ex rel. Shanks, 15 Minn. 379

In an able and elaborate article in the January number of the 1881 American Law Review, on "The Legal Position of the Indian," Mr. George F. Bonfield says: "The relation, then, of the Indian tribes to our sovereign power is similar to that between any two distinct adjacent nations, as the United States and Mexico. The Indian tribes are not subject to our sovereign, do not owe him allegiance. Down to the year 1871, we carried on all negotiations with them by treaty. The Indians who levy war against us are not guilty of treason, they are dealt with as any belligerent foreign power. Neither are they in general subject to our laws or within the jurisdiction of our courts. An Indian who commits a crime against another Indian within the Indian reservation is indictable neither under our common law nor our statute laws and process served upon an Indian on a reservation is a nullity."

Harkness vs. Hyde, 98 U. S. 476

Act of March 3d, 1871—But it is claimed that the act of March 3d, 1871, which provides that no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation or tribe with which the United States may contract by treaty, etc., was intended to destroy the tribes as seperate nations.

The writer just quoted meets this argument fairly: "It seems to me the purpose of this statute was not to destroy the tribes as political communities, but simply to deprive the President of his treaty-making power, for it is to be noticed that it says, not that no Indian tribe shall be recognized as a nation or tribe but that no Indian tribe shall be recognized as a nation or tribe capable of acting with us by treaty. If the tribes were destroyed as tribes then could the treaties with them continue to have force and this is the interpretation which is alone consistant with the action of congress and the decisions of the courts, for they have both continued to recognize the Indian tribes as a distinct *quasi*—soverign people.

United States vs. Forty-three gallons whiskey, 93 U. S., 108.

Fourteenth Amendment.—Section 1 declares that "all persons born or naturalized in the United States and subject to jurisdiction thereof, are citizens of the United States."

This amendment does not confer citizenship upon Indians living with their tribes, because they were not born in the allegiance of the United States except in a qualified sense.

Judge Deady in a case almost identical with this says the fourteenth amendment does not apply to the Indian tribes. "The Indian tribes within the territory of the United States are independent political communities, and a child of a member therof, though born within the limits of the United States, is not a citizen thereof, because not born subject to its jurisdiction."

McKay vs. Campbell, 2 Sawyer, 118

Judge Cooley in his edition of "Story on the Constitution," says: "It would be inconsistent with the semi-independent character of such

a tribe, and with the obedience they are expected to render to their tribal head, that they should be invested with the complete rights, or on the other hand subject to the full responsibilities of American citizens. It would not for one moment be contended that such was the effect of such amendment."

2 Story on Constitution, section 1933.

Senator Carpenter in the report from the judiciary committee referred to above, reached substantially the same conclusion as Judge Cooley.

Chancellor Kent says that Indians sustaining tribal relations: "Have never been regarded as citizens or members of our body politic within the contemplation of the constitution. They have always been and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection and subject to our correction so far as the public safety requires and no further."

Goodell vs. Jackson, 20 John, 701

Roche vs. Washington, 19 Indiana, 56

"We conclude therefore that the Indian tribes are distinct political communities not subject to our laws in general, or to our sovereign; that despite all the changes of the past fifty years; the pressure of our population upon the Indians, and their development towards more civilized modes of life and our altered sentiments towards them—their position has remained unchanged and is the same oday, as when Marshall, C. J., delivered his famous opinion in the Cherokee Nation vs. Georgia, and Worcester vs. The State of Georgia."

American Law Rev. January No. 1881.

II.

NON-TRIBAL INDIANS.

Indians by severing their tribal relations do not become citizens of the United States.

The petition is vague and uncertain in that it fails to state the tribe to which the Indian originally belonged. We know only by inference that he is a North American Indian. We know nothing of his ancestry. He seems to have been dropped from the clouds to raise this question. Again there is no allegation as to what act he had done to render himtelf subject to the jurisdiction of the United States, other than a change in mental allegiance from his tribe to the government. It further does not appear that the defendant was informed as to the status of the Indian. The simple question then is whether any Indian not taxed can make himself a citizen of the United States by abandoning his nomadic life and tribal relations and adopting the habits and li'e of civilized people.

Civil Rights Act —The civil rights acts passed by Congress in the year 1866, provides that "all persons born in the United States and not subject to the jurisdiction of any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

This act was passed by the same Congress that submitted the fourteenth amendment to the legislatures, and Judge Wallace in the case of United States vs. Abraham Elm United States District Court, Northern District of New York, says he "regards the civil rights act as a contemporaneous construction of the meaning of the fourteenth amendment. Both the amendment and the civil rights act dealt with the question of citizenship, and in the declaration defining the class of persons to whom it was extended, language almost identical was used by each."

But counsel urge why were the words "excluding Indians not taxed," dropped from the fourteenth amendment, if Indians not taxed were to be excluded from citizenship. The answer is at hand, that in the opinion of congress, the words "and subject to the jurisdiction thereof," would exclude Indians not taxed.

Such was the opinion of the senate judiciary committee report, *supra*.

Representation.--We quote from report: "And in the opinion of your committee, the second section of the amendment furnishes conclusive evidence of this fact, and settles the question. It provides 'representatives shall be apportioned among the several states, ac cord ng to their respective numbers, counting the whole number of

persons in each state, excluding Indians not taxed.' The original Constitution determined the basis of representation 'by adding to the whole number of free persons, including those bound to serve for a term of years, and excluding Indians not taxed, three-fifths of all other persons.' That is three-fifths of the slave population were to be added to the number of free persons. The fourteenth amendment, section 1, further provides that 'no state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States. During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause 'three-fifths of all other persons' is wholly omitted, but the clause 'excluding the Indians not taxed' is retained. The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original Constitution and in the same terms are excluded by the amendment from the constitutional body, the people. Considering the political sentiments which inspired the amendment, it cannot be supposed that it was designed to exclude a particular class of citizens from the basis of representation. The Indians were excluded because they were not citizens."

We in addition urge upon the court that the framers of the XIV amendment could not have considered Indians *not taxed* members of the body politic. Taxation and representation go together. If untaxed Indians are citizens they can vote and hold office. Will it be contended that this plaintiff can hold office, represent the people in Congress, make and enforce laws, and yet not be included in the number upon which representation is based. Suppose we have in this state, five thousand Indians, not taxed, can these Indians be excluded from the basis of representation and yet vote and claim other rights of citizenship. Is not the converse true, inasmuch as all citizens, men, women and children, of whatever race or color, are included in the number that make up the basis of representation, and "Indians not taxed" are expressly excluded—that such Indians are not to be regarded as citizens of the United States.

Born in the United States and subject to the jurisdiction thereof.—These

words do not mean born in the territorial limits, but mean born with in the allegiance of the United State, subject to its laws and power.

This amendment "is nothing more than declaratory of the rule of the common law. To be a citizen of the United States by reason of birth, a person must not only be born within its territorial limits. but mus also be born subject to its jurisdiction.—That is in its power and obedience."

McKay vs. Campbell, 2 Sawyer 126.

2 Kent, page 42.

The plaintiff was born as Kent says: "under the dominion of his tribe," and owed allegiance to his tribal head.

The plaintiff must be born into the government of the United States, before he can become a citizen, except by naturalization, just as children of foreign embassadors born upon our soil must be naturalized. Neither can they by voluntarily exercising the right of expatriation make themselves citizens. A man may give up the country of his birth, but he can only become a citizen of some other country by its consent.

Suppose a child of a foreign minister, born in the United States should say: "I have thrown off my foreign allegiance, and have submitted myself to the jurisdiction of the United States, and claim the right to vote." The courts would say you must first be naturalized before you can claim the rights of citizenship. For the same reason the claim of plaintiff must be denied.

Judge Deady in McKay vs. Campbell, quoted above, says: "The XIV article of the Constitution of the United States, commonly called the fourteenth amendment, is only declaratory of the common law rule on the subject of citizenship by birth, and therefore does not include Indians or others not born subject to the jurisdiction of the United States."

That the amendments to the constitution were not intended to apply to the Indians is shown in the act of congress of 1875, to enable the people of Colorado to form a constitution: "Provided that the constitution shall make no distinction in civil and political rights on account of race and color, *except Indians* not taxed."

This clearly shows that in the opinion of congress, Indians not taxed are not citizens.

Again how is a registrar of votes to know whether an Indian is subject to the jurisdiction of the United States? Is the time of his absence from his tribe to determine? If so, how long a time? Shall it be one year, one day, or five years? If time is to govern, who shall decide as to the length of such time? If the registrar fixes the period of absence from tribal allegiance necessary to bring him within the reign of our law, then the length of time will vary as widely as the different registrars, and there will be no rule or law to govern; and if there be no fixed law to govern the registrar and he is sole arbiter, then he cannot be mulct in damages for an error in judgment; or, if his vocation and pursuits in life are to be considered, what kind of pursuit must he engage in, how proficient must he become before he will be held to have given up his tribal relations. and forsaken his savage and uncivilized callings, habits and customs? Will the fact that he plows? if so, how well must he plow before the evidence must be satisfactory? Will the fact that an Indian is a householder, and hold his land in severalty, make him subject to the jurisdiction of the United States? Can the court in the absence of legislation lay down any rule that will govern judges of election in all cases.

In the Kansas Indians, 5 Wallace, page 737, the court say: "The fact that the primitive habits and customs of the tribe when in a savage state, have been largely broken into by their intercourse with the whites, in the midst of whom by the advance of civilization, they have come to find themselves, does not authorize a state government to regard the tribal organization as gone, and the Indians citizens of the state where they are and subject to its laws."

United States *ex rel.* Shanks. 15 Minn. 378.

In the case of the United States vs. Frank Osborne, 6 Sawyer, 407, the court says: "There appears to be an impression that Indians, situated as Jim and Joe are, (they had lived off their reservation respectively 7 and 13 years and claimed to be citizens and voters) that is who live off the reservation and among and more or less after the manner of white people are citizens and voters of the state, and therefore it is no crime to give them spirituous liquors. But this is a mistake. The Indians are not a portion of the political community

called the people of the United States. And although not foreign nations or persons they have always been regarded and treated as distinct and independent political communities. The state may make any Indian a voter of the United States, may make him a citizen, and then by operation of the fifteenth amendment he becomes a voter within the state where he resides if he is otherwise qualified according to its laws. By the treaty of January 31, 1855 (10 Stat., 1157) the tribal organization and relation of the Wyandott Indians in Kansas with the United States was dissolved and terminated and they were made citizens of the United States to all intents and purposes. But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one not born to, can assume without its consent in some form. The Indians in Oregon not being born subject to the jurisdiction of the United States were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.

Purpose of three amendments.—The supreme court of the United States in the Slaughter-House cases, decided that the courts in construing the thirteenth, fourteenth, and fifteenth amendments must ever keep in mind the immediate purpose and object of these amendments, namely, the emancipation, equality and enfranchisement of the colored race. The court was of the opinion that unless the courts fixed their attention upon the history of the times and the causes, which gave birth to these amendments, the temptation would be great to strain the amendments and extend them beyond the intention of the framers.

"No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them could have been suggested. We mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those, who had formerly exercised unlimited dominion over them."

Slaughter House Cases 16 Wallace 36.

Again in Strauder vs. West Virginia 10 Otto Page 306, the supreme court speaking of the fourteenth amendment, say: "This is one of a series of constitutional provisions, having a *common purpose*, namely, securing to a race that through many generations had been held in slavery, all the civil rights, that the superior race enjoy."

Virginia vs. Rives, 10 Otto, Page 318.

We may then conclude, that the fourteenth amendment was not intended to apply to the Indians.

Naturalization.—Persons are made citizens either by birth or naturalization. We have shown that an Indian is not made a citizen by birth. An Indian therefore must be naturalized as any other person born in alien allegiance. The reason which requires one of foreign birth equally applies to an Indian born without the sovereignty of the United States.

Says Judge Taney: "But they may without doubt like the subject of any foreign government, be naturalized by the authority of congress and become citizens of a state and of the United States; and if any iadividual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges, which would belong to any emigrant from any other foreign people."

Attorney General Cushing in Vol. 7, page 747, considering the question of naturalization of Indians observes:

"Considering the term citizen, in whatever sense, the first subquestion is, whether the mere fact of being born in the United States, constitutes a citizen thereof. Clearly not. Persons may be born abroad, and be natural born citizens, and they may be born here and not born citizens of the United States. It is a mistake to suppose that *alien* as opposed to citizen is a *foreigner*. The fact that Indians are born in this country does not make them citizens. Not being a citizen by mere birth, can they become so by naturalization? Undoubtedly. But they cannot under existing laws, Kent 72. Those acts only apply to foreigners, subjects of another allegiance.

It is however competent for congress to pass an act admitting Indians to citizenship."

Stockbridge Indians.—In 1865 congress passed an act authorizing any member of the tribe of the Stockbridge Indians after having filed in the office of the clerk of the district court, of the United States a declaration of his intention to become a citizen of the United States, and to dissolve all relations with any Indian tribe, two years previous thereto, appears in such court proves to the satisfaction thereof, by the testimony of two citizens, that for five years last past, he has adopted the habits of civillzed life; that he has maintained himself by his own industry; that he reads and speaks the English language; that he is disposed to become a peaceable and orderly citizen, and that he has sufficient capacity to manage his own affairs; the court may enter a decree admitting him to all the rights of a citizen of the United States, and henceforth he shall no longer be treated as a member of any Indian tribe, but shall be entitled to all the rights and privileges and subject to all the duties and liabilities to taxation of other citizens of the United States.

Section 2312, Revised Statutes.

Wyandotts.—The Wyandotts were naturalized by special act.

11 U. S. Statute, 1159.

Both the above tribes were made citizens prior to the ratification of the fourteenth amendment.

Winnebagoes.—But in 1870, after the ratification of the XIV and XV amendments, the Winnebagoes in Minnesota, a branch of the tribe or family of which plaintiff is supposed to be a member, were authorized to become citizens of the United States by an act of Congress in these words. "That if at any time hereafter, any of said Indians, shall desire to become citizens of the United States, they shall make application to the Judge of the District Court of the United States for the District of Minnesota, and in open court make the same proof, and take the same oath of allegiance, as is provided by law for naturalizations of aliens," etc.

16 U. S. Statute, 361.

Again in the severalty land bill discussed in the senate in 1881, Mr. Hoar, of Massachusetts, endeavored to tack an amendment making Indians holding lands in severalty, citizens of the United States. The remarks of Mr. Vest, Mr. Pendleton, of Missouri, and others clearly show that in the opinion of the members of the senate, mere severance of tribal relations and voluntary submission to our laws were not sufficient under the fourteenth amendment to make Indians citizens, but that additional legislation was necessary to confer citizenship.

See Senate Resolution 88, declaring Indians citizens of United States, pending in Senate.

Also a bill introduced in the Senate of the United States by Mr. Teller, February 16th, 1880, entitled "A bill to enable Indians to become citizens of the United States, and for other purposes."

This bill applies to all Indians, and is almost identical in its terms with the act quoted above, conferring citizenship upon the Stockbridge Indians. This bill prohibits alienation of land for five years by an Indian, and then only upon the decree of the Circuit Court of the United States. The reasons requiring persons of foreign birth to become naturalized before becoming citizens applies with great force to Indians. If we require an intelligent, educated foreigner to reside five years in the United States before he becomes a citizen, and require his declaration of intention to become a citizen to be made two years prior to his admission to citizenship, for a much stronger reason the Indians, who have known nothing of civilized governments, should serve a longer period of probation in the government, after they have severed their tribal relations, before being clothed with the political privileges of citizenship.

Ex-parte Kenyon.—The *doctrine* laid down in this case seems to sustain the view of plaintiff that an Indian by severing his tribal allegiance, and merging himself into the mass of our people, became a citizen of the United States.

The petitioner, Kenyon, was convicted of larceny, and sought his release by *habeas corpus* on the ground that he was a citizen of the United States. "The petitioner was born of white parents, who were citizens of the United states, living in the state of Connecticut;

then he went to the Cherokee nation, Indian Territory. After remaining there some time, he was married to Mollie Cobb, a citizen of the nation."

The question was whether he was a citizen of the Unitod States, or of the Cherokee nation, where he had resided six years.

The court decided upon grounds entirely distinct from those in issue in this case that the plaintiff was a citizen of the United States. Kenyon being a white person born in Connecticut of citizens of the United States, and not having during his residence served his allegiaece to the United States, the decision was correct.

Ex-parte Kenyon, 5 Dill., 386.

Exparte Reynolds.—Reynolds was charged with the murder of Mr. Puryear. In order to give the court jurisdiction it must be shown that either Reynolds or Puryear, or both, were citizens of the United States. "Reynolds was a white man by nationality, by birth," therefore a citizen.

"The evidence in the case showing that the paternal grandfather of Mrs. Puryear was a white man, living in the state of Mississippi, and not with an Indian tribe; a citizen of the state of Mississippi and of the United States, the principles above enumerated make her father a citizen of the United States and subject to the jurisdiction of the courts thereof. The same principle would make Mrs. Puryear a citizen of the United States, and subject to the jurisdiction of the courts thereof. That being the case, Mr. Puryear was married to a woman, who was legally a member of the white race, or of the body politic, known as citizens of the United States."

When we consider that these two decisions were made by a district judge, in a criminal case, and that the doctrines enunciated were *obiter dicta*, and that the citizenship in each case was decided in favor of petitioners, because they were white people; born in the United States, or chi'dren of citizens of the United States, they ought to have but little weight with the court in deciding this case.

Ex-parte Reynolds, 5 Dill., 395.

United States vs. Abraham Elm.—In this case the defendant was indicted for illegal voting. The court held that inasmuch as the Oneida tribe of Indians was *defunct* and the Indians of that tribe had by the laws of New York been made subject to the jurisdiction of the laws of the state and the defendant was *taxable* and *paid taxes* therefore he was a citizen of the United States and entitled to vote. The decision is placed squarely on the ground that the defendant was subject to taxation.

United States vs. Abraham Elm, decided by Wallace J. Northern District of New York.

Remarks.—We cannot but think the philanthropy is misplaced, which would make the Indians citizens. As *wards* of the government they are the objects of especial care and protection, as against the superior intelligence, cunning, and treachery of the white man. As *citizens* they must stand upon their own feet and receive only the general protection, which the law extends alike to all its citizens. A greater injustice could not be done to the Indian, than to withdraw the strong hand of government, which has so long sustained him and impose upon him the duties and responsibilities of citizenship.

Mr. Francis Walker, ex-Commissioner of Indian affairs, in his book entitled the "Indian Question," page 140, and in an article in the May number of the "International Review," 1874, enforces his views in these words: "The United States has by recent treaties and legislative enactments, admitted to citizenship the following Indians: In Kansas, Kickapoos 12, Delawares 20; Wyandotts, 473; Potawatomies, 1604; in Dakota, Sioux 250, in Minnesota, Winnebagoes 159; in Wisconsin, Stockbridges to a number not yet officially ascertained; in Michigan, Ottawas and Chippewas 6039; in Indian Territory, Ottawas of Blanchards Fork 150. Time has not yet been given for the full developement of the consequences of thus devolving responsibility upon these Indians; but we already have information, official or semi-official, to the effect that the majority of the Pottawatawies citizens, after selling their lands in Kansas, have gone to the Indian Territory, and re-associated themselves as a tribe; that of the Wyandotts, considerable numbers have attached themselves to the reorgan-

ized tribe in the Indian Territory; that of the citizens Ot'awas of Blanchards Fork, nearly all have disposed of their allotted lands and are still cared for, to some extent, by the government as Indians; that of the Ottawas and Chippewas of Michigan, a majority certainly, and probably a large majority, have sold the lands patented to them in severalty; in many cases the negotiation preceding the issue of patents, two parties of white sha pers contended for the favor of the agents in the way of earley informatiom as to the precise lands assigned and the disappointed faction, in at least one instance resorted to burglary and larcency for the needed documents. It will thus be seen. that of the Indians upon whom the experiment of citizenship has been tried, more than half, probably at least two-thirds, are now homeless, and must be re-endowed by the government, or they will sink to a condition of hopeless poverty and misery.

The dissolution of the tribal bonds, and the dispersing of two hundred thousand Indians among the settlements, will devolve upon the present and future states, beyond the Missouri, and almost intolerable burden of vagabondage, pauperism and crime. * * * * Unless the system of reservations shall soon be recast, and the laws of non-intercourse, thoroughly enforced, the next fifteen or twenty years will see the great majority of the Indians on the plains mixed up with white settlements, wandering in small camps from place to place, shifting sores upon the public body; the men resorting for a .iving to basket making, beggary and hog stealing, the women to fortune-telling, beggary and harlotry; while a remnant will seek to maintain a little longer in the mountains their savage independence, fleeing before the advance of settlements when they can; fighting in sullen despair when they must. * * * * * To believe that a pioneer population of two, three or four millions such as is likely to occupy this region within the next twenty years, can, in addition to its own proper elements of disorder, safely absorb such a mass of corruption, requires no small faith in the robust virtue of our people and in the saving efficacy of republican institutions."

The Indians are a nation of aristocratic idlers, gentlemen of leisure; the only native sporting class in America. They know not what it is to labor, to plow and to sow. Their ideas of government are the simplest and rudest, consisting of allegiance to a chieftain who has won his place by violence and holds it without right or justice.